

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

ESTATE OF ELENA STOYKA,
by Michelle Stoyka, her personal
representative;
MICHELLE STOYKA and
MICHAEL STOYKA;
Individually,

Plaintiffs,

vs.

Case No. 2004-2686-NH

MACOMB EMERGENCY CARE
PHYSICIANS, P.C., a Michigan
corporation;
DR. ROBERT FABER;
MT. CLEMENS GENERAL HOSPITAL,
a Michigan corp.; and
DR. MICHAEL KITTO;
Jointly and Severally,

Defendants.

OPINION AND ORDER

Defendants Macomb Emergency Care Physicians, P.C.; Dr. Robert Faber; Mt. Clemens General Hospital and Dr. Michael Kitto move for summary disposition under MCR 2.116(C)(7), (8) and (10).

I. BACKGROUND

Plaintiffs Estate of Elena Stoyka, Michelle Stoyka and Michael Stoyka originally filed this action on June 25, 2004 asserting plaintiffs Michelle Stoyka and Michael Stoyka were the parents of 2½-year-old Elena Stoyka. Elena Stoyka presented to her pediatrician, Dr. Mizra, on February 14, 2003 with complaints of difficulty breathing and an elevated temperature. Elena



Stoyka was transferred by ambulance to St. John Hospital for admission due to her difficulty breathing.

Plaintiffs contend the ambulance was instead routed to defendant St. Joseph's Mercy of Macomb where Nurse C. Zangarola saw Elena Stoyka at approximately 3:20 p.m. At the time, Elena Stoyka was noted to have sternal and clavicular retractions, inspiratory stridor, a barking cough and a temperature of 104.9°. At 3:50 p.m., Elena Stoyka's oxygen saturation was 98% and she had 24 respirations per minute. An x-ray was taken at 4:17 p.m. that Dr. Anthony Munaco, a radiologist, read as showing mild subglottic edema; Dr. Munaco's impression was bronchitis and/or asthma.

Plaintiffs claim Elena Stoyka's oxygen level was 96% at 5:40 p.m. and her respirations were 22 per minute. Defendant Dr. Robert Faber, an employee of defendant Macomb Emergency Care Physicians, P.C., noted Elena Stoyka's throat was slightly red and requested a consultation. Dr. Norma M. Inocencio, the consulting doctor, evaluated Elena Stoyka at 7:20 p.m.; Dr. Inocencio's impression was acute spasmodic croup with respiratory distress. Dr. Inocencio suggested Elena Stoyka should be discharged and follow-up with her pediatrician in the morning. The final nursing note indicates Elena Stoyka had an oxygen level of 94% with respirations of 24 per minute. Elena Stoyka was discharged at 7:30 p.m. with instructions to follow-up with her pediatrician in 1-2 days, use a cool mist humidifier, given a prescription for Decadron and instructed to return to the emergency room if she worsened.

Plaintiffs state Elena Stoyka was brought back to the ER at approximately 11:34 p.m. Nurse Shaw's triage record noted Elena Stoyka had increased respiratory effort and was refusing oral steroid. Elena Stoyka had an oxygen level of 96%, temperature of 96.2° and pulse of 174 beats per minute. Nurse Shaw rated Elena Stoyka's pain on the Faces scale as 8/10. Defendant

Dr. Harry Aretakis was the attending room physician during this second presentation but never saw Elena Stoyka: Elena Stoyka was not called from the waiting room until 1:26 a.m. on February 15, 2003, by which time her parents had taken her home for another breathing treatment.

Plaintiffs aver EMS was called at 3:57 a.m. on February 15, 2003 because Elena Stoyka was having difficulty breathing. An ambulance transported Elena Stoyka to defendant Mount Clemens General Hospital at 4:36 a.m. Nurse Garrett evaluated Elena Stoyka in triage at 4:47 a.m. and noted Elena Stoyka had been diagnosed with croup the previous day. A respiratory therapist gave Vaponephrine to Elena Stoyka at approximately 5:15 a.m. An x-ray was taken about 5:35 a.m. that defendant Dr. Michael Kitto, the attending emergency room physician, interpreted as showing evidence of steeple sign consistent with croup. Dr. Kitto noted Vaponephrine updraft treatment provided only slight relief. In the emergency room, Elena Stoyka was suffering acute respiratory distress with a temperature of 103.1° and her oxygen level was 95%; she was admitted at 6:45 a.m., waiting for a bed and orders.

Plaintiffs assert defendant Dr. Kitto discussed Elena Stoyka's condition with Dr. Halina Weidner-Czaja, a pediatrician. Their plan was for an intravenous line (IV), Decadron, complete blood count (CBC), respiratory syncytial virus (RSV) culture, blood culture (BC) every shift, Tylenol/Motrin, Vaponephrine and for the house officer to be called every four hours to assess the need for Vaponephrine. A nurse noted Elena Stoyka's pulse was 148 beats per minute at 7:20 a.m., had respirations of 38 per minute and was pending bed assignment.

Plaintiffs contend Dr. Ifeoma Eke, the pediatric resident, began taking a history and physical of Elena Stoyka at 8 a.m. Elena Stoyka was transferred to room 530 on the pediatric floor at approximately 9:40 a.m. The pediatric nursing record indicates Elena Stoyka arrived at

10:20 a.m., had audible wheezes and was short of breath. Dr. Eke was called and said not to give a Vaponephrine treatment until she arrived although she was aware Elena Stoyka's last treatment had been at 5:15 a.m. in the ER.

Plaintiffs claim Elena Stoyka began gasping for breath and plaintiff Michelle Stoyka and/or plaintiff Michael Stoyka shouted for help. Elena Stoyka quickly became unconscious and collapsed in plaintiff Michelle Stoyka's arms. Dr. Abraham and/or Dr. Eke began cardiopulmonary resuscitation (CPR) treatment; plaintiffs Michelle Stoyka and Michael Stoyka were asked to leave the room. An emergency code was called at 10:40 a.m. An endotracheal (ET) tube was placed at 10:55 a.m. and emergency intubation was performed at 11:09 a.m. The intubation, as well as bag and mask ventilation, was unsuccessful. Elena Stoyka was pronounced dead at 11:33 a.m. on February 15, 2003.

Accordingly, plaintiffs' complaint alleges Medical Malpractice.

An Order of Dismissal as to Harry Aretakis, Only without prejudice or costs was entered June 14, 2005.¹

On April 17, 2006, defendant St. Joseph's Mercy moved for summary disposition. On April 24, 2006 defendants Macomb Emergency Care Physicians and Dr. Faber moved for summary disposition. Defendants Mt. Clemens General and Dr. Kitto also moved for summary disposition on April 24, 2006. Defendant St. Joseph's Mercy concurred and joined in defendants Macomb Emergency Care Physicians, Dr. Faber, Mt. Clemens General and Dr. Kitto's motions for summary disposition on April 24, 2006. Defendants Macomb Emergency Care Physicians and Dr. Faber concurred in defendants Mt. Clemens General and Dr. Kitto's motion for summary disposition on May 5, 2006.

Defendant St. Joseph's Mercy and plaintiffs had accepted the case evaluation award of

\$15,000 against defendant St. Joseph's Mercy. Thus, defendant St. Joseph's Mercy was dismissed June 30, 2006.²

II. STANDARD OF REVIEW

In reviewing a motion under MCR 2.116(C)(7), a court will accept the allegations of the complaint as true unless contradicted by documentary evidence. *Pusakulich v. City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). The reviewing court must consider any affidavits, depositions, admissions and other documentary evidence submitted by the parties that would be admissible as evidence at trial. *Id.*

The parties have relied on matters outside of the pleadings in arguing the instant motion under MCR 2.116(C)(8). Therefore, the instant motion will be construed as though originally brought only under MCR 2.116(C)(10). *Merit Electric Co, Inc v J Boyle, Inc*, 77 Mich App 503, 510; 258 NW2d 539 (1977); see also *Huff v Ford Motor Co*, 127 Mich App 287, 293; 338 NW2d 387 (1983).

A motion for summary-disposition under MCR 2.116(C)(10) tests the factual support for a claim. The reviewing court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light most favorable to the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The nonmoving party must proffer evidence establishing a material issue of disputed fact exists for trial to avoid summary disposition. *Id.*

III. ANALYSIS

In *Roberts v Mecosta County Gen Hosp (After Remand)*, 470 Mich 679, 690, 692, 694, 699-700; 684 NW2d 711 (2004), our Supreme Court stated:

¹The case caption has been correspondingly amended.

²The case caption has been correspondingly amended.

Plaintiff's notices of intent primarily set forth facts demonstrating an unfavorable outcome—the fact that plaintiff had suffered an ectopic pregnancy and a ruptured “left tube” that was not diagnosed by defendants. Although the notices satisfy some of the requirements of § 2912b, they do not satisfy *all* of those requirements. Missing from the notices are (1) a statement of the particular standard of practice or care applicable to each of the various defendants, (2) statements regarding the manner in which it was claimed that defendants breached the alleged standards of practice or care, (3) statements alleging the actions that should have been taken by defendants, and (4) statements regarding the manner in which defendants’ breaches of the standards of practice or care were alleged to have constituted the proximate cause of plaintiff’s injury.

* * *

Here, several different medical caregivers were alleged to have engaged in medical malpractice. Yet, rather than stating an alleged standard of practice or care for each of the various defendants—a hospital, a professional corporation, an obstetrician, a physician’s assistant, and an emergency room physician—plaintiff’s notices of intent allege an identical statement applicable to all defendants [footnote omitted] in response to § 2912b(4)(b)....

[P]laintiff was required to make a good-faith averment of *some* particularized standard for each of the professionals and facilities named in the notices. [Footnote omitted.]

With no specific allegations regarding the conduct of any of the named defendants, the notices are insufficient to meet the particularized requirements of § 2912b(4)(e). [Footnote omitted, emphasis original.]

In the instant matter, the various notices of intent to file a claim, despite being amended several times (including after the complaint had been filed and after at least some discovery should have been accomplished),³ contain but a single standard of care encompassing all caretakers (facilities, doctors—emergency room physicians and pediatricians, nurses, respiratory therapists, unspecified medical staff and other employees) without distinction although only certain caretakers (with differing specialties) were involved at the various stages of Elena Stoyka’s care. The various notices of intent noticeably neglect to single out each caretaker’s standard of care and particular failing.⁴

³Plaintiffs have apparently served an original and *seven* amended notices of intent to sue.

⁴Indeed, “Plaintiffs’ Seventh Amended Notice” merely states “the applicable standards of practice have been breached by all of the above named parties in at least one of the following [31] particulars”.

Therefore, plaintiffs' notices of intent clearly fail to meet the standards set forth in *Roberts, supra*. See also *Gawlik v. Rengachary*, 270 Mich App 1; 714 NW2d 386 (2006). Consequently, the notices of intent must be stricken. Moreover, as the statute of limitation on plaintiffs' medical malpractice claim has run, this action must be dismissed. *Roberts, supra* at 702.

IV. CONCLUSION

For the reasons set forth above, defendants Macomb Emergency Care Physicians, P.C.; Dr. Robert Faber; Mt. Clemens General Hospital and Dr. Michael Kitto's motions for summary disposition are GRANTED under MCR 2.116(C)(7) and (10).

Accordingly, plaintiffs Estate of Elena Stoyka, Michelle Stoyka and Michael Stoyka's complaint is DISMISSED, with prejudice. MCR 2.116(I)(1).

This Opinion and Order resolves the last pending claim in this matter and closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Dated: July 6, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Kevin J. Cox
Bruce R. Shaw
Cynthia E. Merry
Scott A. Saurbier

DONALD G. MILLER
CIRCUIT JUDGE

JUL - 6 2006

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GARMELLA SABAUGH, COUNTY CLERK

BY:  Court Clerk